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PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS FOR NOVEMBER.

Edited by ARDEMUS STEWART.

The Supreme Court of New Jersey has lately decided, in *Lynch* v. *N. Y., L. E. & W. R. R.*, 30 Atl. Rep. 187, that a suit is not commenced by the signing and sealing of a summons, which has been retained in the office of the attorney, without any purpose of immediate service.

Actions

According to the Circuit Court for the Southern District of New York, as expressed in *In re Howard*, 63 Fed. Rep. 263, an "undercoachman," whose duties are partly to assist in keeping stables, horses and carriages in good order, but principally to drive the horses when his employer, or any of his family, go out in carriages, and to accompany on horseback the younger members of the family when they go out on horseback; and who boards with his employer's coachman, and sleeps in a room over the coach-

Aliens

house, is a "personal or domestic servant" within the meaning of the U. S. Statute of 1885, c. 164, prohibiting the immigration of aliens under contracts for labor, and providing that the provisions of the act shall not apply to "persons employed strictly as personal or domestic servants." Since, however, the Statute of 1888, c. 1210, makes the decision of the Secretary of the Treasury on such subjects conclusive, the court declined to discharge the relator on *habeas corpus*.

Assignment for Benefit of Creditors

The Court of Civil Appeals of Texas has recently ruled, that when an insolvent debtor executes, as part of the same transaction, several interdependent deeds of trust, passing title to all his property subject to execution, for the benefit of certain creditors, with a provision that the surplus, if any, is to be distributed among his other creditors, holding legal claims, the deeds constitute a general assignment: *City Natl. Bk.* v. *Merch. Natl. Bk.*, 27 S. W. Rep. 848.

Banks and Banking

In the opinion of the Supreme Judicial Court of Massachusetts, when money is deposited with the cashier of a bank, under an agreement that it shall be invested by the bank in bonds and stocks, the bank is liable for the return of the money, no investment having been made, though the agreement for investment by the bank was *ultra vires;* and the fact that the cashier embezzled the money will not affect the bank's liability: *L'Herbette* v. *Pittsfield Natl. Bk.*, 38 N. E. Rep. 368.

Bicycles

The Supreme Court of Minnesota has rendered a decision which will be welcome to all devotees of bicycling, for the manner in which it asserts their rights upon public highways. The substance of that decision is, that where a bicycler is riding along a highway, and a horse takes fright at him, he will not be liable in damages to any one injured thereby, unless he was acting in disregard of the rights of others. The highway is intended for public use, and a person driving a horse thereon has no rights superior to

those of a person riding a bicycle. A bicycle is a vehicle, and riding one in the usual manner, as is now done upon public highways, for convenience, recreation, pleasure or business, is not unlawful; "they cannot be banished, because they were not ancient vehicles, and used in the Garden of Eden by Adam and Eve:" *Thompson* v. *Dodge*, 60 N. W. Rep. 545.

Bids

In the opinion of the Supreme Court of Pennsylvania, an act, which directs municipal officers to award certain contracts to the "lowest responsible bidder," vests discretionary, and not merely ministerial powers in such officers, the word "responsible." as therein used, applying not only to pecuniary ability, but also to judgment and skill: *Interstate Vitrified Brick and Paving Co.* v. *City of Philadelphia*, 30 Atl. Rep. 383; following *Comm.* v. *Mitchell*, 82 Pa. 343; *Findley* v. *Pittsburgh*, 82 Pa. 351; *Douglas* v. *Comm.*, 108 Pa. 559; *Pavement Co.* v. *Wagner*, 139 Pa. 623; S. C., 21 Atl. Rep. 160.

Bill of Exceptions

The Supreme Court of South Dakota, in *Merchants' Natl. Bk.* v. *McKinney*, 60 N. W. Rep. 162, has ruled, that a stenographer's or referee's notes of evidence cannot, by stipulation of the parties, take the place of the bill of exceptions, or of the statement of the case settled by the judge, which must be returned to the Supreme Court by the clerk of the court below, as part of the judgment roll.

Building Associations

In the recent case of *Charles Tyrrell Loan & Bldg. Assn.* v. *Haley*, 30 Atl. Rep. 154, the Supreme Court of Pennsylvania held, that a member of a building and loan association, whose shares have not matured according to the mode of computation originally adopted by the association, and used by it for nearly thirty years, is not estopped from claiming that by another and more just method of computation his shares are matured. FELL and MITCHELL, JJ., dissented, however, and it would seem with good reason. In the first place, the association, in the absence of any statutory

restrictions, certainly has a right to adopt any method, not manifestly unjust, of computing the value of its shares, which it pleases; and in the second place, the member, having taken his shares with full knowledge of the fact that such method of computation was the rule of the association, and not having objected to it previously, as applied to the shares of others, ought not to be heard now to raise that objection.

Carriers, Fares

The Supreme Court of Michigan has lately ruled, in *Zagelmeyer* v. *Cincin., S. & M. Ry. Co.*, 60 N. W. Rep. 436, that a railroad company cannot impose, as a penalty for not purchasing a ticket, such a sum that the fare collected on the train, including that additional amount, shall exceed the maximum rate of fare allowed by law.

Negligence

The Court of Civil Appeals of Texas has just rendered a curious decision, in *Pac. Exp. Co.* v. *Black*, 27 S. W. Rep. 830, that a husband may recover from an express company, which has failed to promptly deliver medicines shipped to his wife, damages for both the physical and mental suffering of the wife, but not for sympathetic mental suffering by him on account of the wife's pain. The latter is too remote.

Torts of Servants

The ruling of the Supreme Court of North Carolina, in *White* v. *Norfolk & S. R. R.*, 20 S. E. Rep. 191, is of great importance to travellers, though fortunately the state of facts which gave rise to it is not of frequent occurrence. The court held that a carrier is liable to a passenger for damages, if one of the crew goes outside of his line of duty and assaults him; and that this doctrine rests upon the obligation of the carrier, not only to carry his passengers safely, but to protect them from ill treatment by other passengers, intruders, or employés. This is the general rule: *East Tenn., V. & G. Ry. Co.* v. *Fleetwood*, (Ga.), 15 S. E. Rep. 778; *Indianapolis Union Ry. Co.* v. *Cooper*, (Ind.), 33 N. E. Rep. 219; *Citizens' St. Ry. Co. of Indianapolis* v. *Willoeby*, (Ind.), 33 N. E. Rep. 627; *Harrold* v. *Winona & St. Peter R. R.*, 47 Minn. 17; S. C., 49 N. W. Rep. 389; *Galveston, H. & S. A. Ry. Co.* v. *McMonigal*, (Tex.), 25 S. W.

Rep. 341; but the carrier is not liable if the servant was exposed to provocation sufficient to justify the assault, or acted in self defence, under a reasonable apprehension of immediate danger: *New Orleans & Northeastern R. R. Co.* v. *Jones*, 142 U. S. 18; S. C., 12 Sup. Ct. Rep. 109.

Charitable Bequests

The English Chancery Division has lately decided, in *Alt* v. *Lord Stratheden*, [1894] 3 Ch. 265, that a gift by will for the benefit of a volunteer corps is a charitable bequest; and that a bequest of an annuity to be provided to a volunteer corps on the appointment of the next lieutenant-colonel, is void as a transgression of the rule against perpetuities, since such an officer may never be appointed.

Conspiracy, Injunction

The Supreme Court of Pennsylvania, in the recent case of *Wick China Co.* v. *Brown*, 30 Atl. Rep. 261, ruled, that a preliminary injunction, rightfully granted against members of a labor union, alleged to have combined and conspired to prevent the plaintiff from employing other workmen in its factory, should not have been dissolved, when the answer, signed by twenty-one of the defendants, is not sworn to, though affidavits, made by nearly all the defendants, deny certain acts of violence charged in the bill. The order dissolving the preliminary injunction was reversed and set aside, and the injunction reinstated and continued.

Conversion, Real Estate

The Supreme Court of Nebraska has recently passed upon a new question of law, in *Pope* v. *Benster*, 60 N. W. Rep. 561, holding that there was no reason why real estate should not be made the subject of a suit in the nature of conversion, by analogy to personal property; and that therefore (1) When the owner of a judgment, which to his knowledge has been paid, but never satisfied of record, and which remains an apparent lien on real estate of another, causes execution to be issued on that judgment, the real estate on which it is an apparent lien to be levied on and sold, such sale to be confirmed, and a conveyance therefor to be executed and delivered to the purchaser at the execution sale, and

accepts the proceeds of that sale, the owner of the real estate so sold may treat the sale as void and recover the land; or, at his election, he may waive the invalidity of the sale, and sue the owner of the judgment for the value of the real estate; (2) The measure of damages in such a case is the fair market value of the interest of the owner in the real estate at the time of its sale on execution; (3) In such an action, the owner of the judgment is estopped from asserting, as a defence, that the execution sale, and the subsequent proceedings, were void.

Constitutional Law, Board of Health

According to the Supreme Court of Nebraska, a Board of Health may be authorized by statute to make rules for the disinfection of the baggage of persons coming from a country where contagious disease exists, and making it a misdemeanor for any person to refuse to permit his baggage to be disinfected, and such rules are therefore not unconstitutional; but such a statute does not authorize a rule to subject the baggage of *all* immigrants to disinfection, irrespective of the locality from which they come: *Hurst* v. *Warner*, 60 N. W. Rep. 440.

Exclusive Privilege

The Supreme Court of Nebraska holds that a contract for the removal of dead animals, garbage and other noxious and unwholesome matter, from cities, though conferring exclusive privileges upon the contractor, is not unconstitutional, as contravening a provision of the constitution that "the legislature shall not pass any special or local laws . . . . granting to any corporation, association or individual, any special or exclusive privileges, immunity or franchise whatever:" *Smiley* v. *MacDonald*, 60 N. W. Rep. 355.

Corporation, Contracts of Promoters

In the opinion of the Court of Appeals of New York, when the president of a corporation ratifies for the benefit of the corporation a contract made by him while acting as a promoter thereof, for services to be rendered to the corporation, and such services are performed for the corporation, and the contract providing therefor is one which would have bound the corporation, if made by the presi-

dent after it had acquired a legal existence, the corporation is bound by the contract: *Oakes* v. *Cataraugus Water Co.*, 38 N. E. Rep. 461.

Election of Officers

The Court of Appeals of Colorado has recently decided, that when, by statute or charter, the power of electing the president of a corporation is vested in the board of directors, an election of a president by the stockholders at their annual meeting is a nullity, and confers no title to the office: *Walsenburg Water Co.* v. *Moore*, 38 Pac. Rep. 60.

Meetings, Adjournment

The English Chancery Division has recently passed upon a very interesting point of parliamentary practice, in *Natl. Dwellings Soc.* v. *Sykes*, [1894] 3 Ch. 159, in which case it was held, that it is the duty of a chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it; but that he has no power to stop or adjourn a meeting at his own will; and if he attempts to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another chairman for that purpose.

Subscription, Withdrawal

The same court has ruled, that the withdrawal of an application for shares in a corporation may be made orally at any time before notice of allotment is given; and that, in the absence of evidence to the contrary, the court will presume that a clerk in the registered office of a corporation, is, during business hours, and while the secretary is absent, so far in charge of the office, that he has authority to receive a notice, so as to make it a communication to the corporation: *In re Brewery Assets Corporation*, [1894] 3 Ch. 272.

Courts, Jurisdiction

In the opinion of the Supreme Court of Iowa, the fact that, pending a suit to subject land to the payment of a judgment, the judgment is satisfied of record, does not deprive the court of further jurisdiction, so as to render a decree of sale void: *Oliver* v. *Riley*, 60 N. W. Rep. 180.

Custom and Usage

The last mentioned court has also lately decided, that when a contract of shipment by rail does not define what shall constitute a carload, a general custom among railroad men and shippers, by which a carload is made to consist of a certain number of pounds, governs the contract: *Good* v. *Chic., R. I. & P. Ry. Co.*, 60 N. W. Rep. 631.

Deeds

The Supreme Court of Indiana holds that a deed of land, given by one not judicially declared insane, cannot, during his lifetime, be avoided on the ground of insanity, by one to whom, under the provisions of a will, the land would descend, if not disposed of by the grantor in the deed during his lifetime: *McMillan* v. *Deering*, 38 N. E. Rep. 398.

Devise

The Chancery Division has recently reasserted the doctrine, that if it can be gathered from the words used by the testator, that he intended to give a particular property to a legatee, but owing to the testator having several properties answering the description in the will, it is impossible to say, either from the will itself, or from extrinsic evidence, which of these several properties the testator referred to, the gift fails for uncertainty, and the court cannot, to avoid intestacy, construe the will as giving the legatee the option of electing which property he will take: *Asten* v. *Asten*, [1894] 3 Ch. 260.

Duress

According to the Supreme Court of Michigan, money paid by a mortgagee, in excess of the amount due on the mortgage, to stop foreclosure proceedings, is a voluntary payment, and cannot be recovered on the ground of duress: *Vereycken* v. *Vandenhook*, 60 N. W. Rep. 687.

Easements

The Supreme Judicial Court of Massachusetts has lately held, in *Shaughnessy* v. *Leary*, 38 N. E. Rep. 197, that when a person has adversely used a wooden drain across another's land, the laying of an earthen pipe inside the wooden drain does not interrupt the running of the

statute of limitations in favor of the easement therein, for a greater or more burdensome use of the drain does not make it a different drain, or destroy the character of such use as is continuous; and, as a matter of law, the fact that the earthen pipe was laid at the joint expense of the owners of the servient and the dominant tenements does not prevent the use of it by the latter from being adverse. Nor, according to the same court, does an enlargement of a drain at the joint expense of the owners of the servient and dominant tenements, destroy the identity of the drain so as to destroy the easement: *Jones* v. *Adams*, 38 N. E. Rep. 437.

Elections, Ballots

The Supreme Court of Michigan very properly holds, that voters may rely upon the regularity of the ballots prepared by the proper officers; and that it does not matter that a person whose name is printed on the ballot was not the nominee of any party, and that his name was not properly certified, and not entitled to a place on the ballot; if elected, he is entitled to the office: *Bragdon* v. *Navarre*, 60 N. W. Rep. 277. This, of course, supposes that no fraud was intended or practiced by the officers who prepared the ballots; if such was the case, the above decision would hardly apply.

Polling Places

The Supreme Court of New York is of opinion, that a statute, providing that the inhabitants of a town may have their polling place in a city created within the limits of the town, is constitutional: *Peo* v. *Carson*, 30 N. Y. Suppl., 817.

Voters, Disability

The Supreme Court of Minnesota has just rendered an important decision under the Australian Ballot Law, in *State* v. *Braley*, 60 N. W. Rep. 676, to the effect that the requirement of the statute that an oath must be administered to an alleged illiterate or physically disabled voter before he can have the aid of another person in marking his ballot, is mandatory; and the voter who requests such aid must, under oath, bring himself strictly within the terms of the statute as to his inability to mark his own ballot. He cannot avail himself of aid on the ground that he usually uses glasses, but has not brought them with him. The same was

held by the Supreme Court of Michigan, a few months earlier, in *Ellis* v. *Reynolds*, 58 N. W. Rep., 483, with the further ruling, that if the voter does not make the oath required, though he is in fact within the terms of the act as to disability, his vote should not be counted, though no fraud is intended. The Pennsylvania Ballot Law is weak, in not requiring oath as to disability; yet it has been held that even under it, officers of election might, and should, in case of doubt, examine the voter on oath as to his good faith in alleging his disability: *In re Election Instructions*, 2 D. R. (Pa.) 1. But in another case, in the same state, *In re Beaver Co. Elections*, 12 Pa. C. C. R. 227, it was ruled, that the voter was the sole judge of his disability. Locality may have had something to do with this difference of opinion, the latter decision coming from the vicinity of Senator Quay's home. It was also held, in the former of these Pennsylvania cases, that the act only contemplated actual physical disability, such as blindness, paralysis, infirmity or decrepitude, inability to read, etc., and did not include drunkenness, or ignorance of the proper method of marking, due to neglect by the voter to inform himself on that point. The general practice of election boards in Pennsylvania, however, is to allow the voter assistance on his mere request.

Eminent Domain

The Court of Appeals of New York has recently decided, in accord with the best authority, that the occupation of a rural highway, the fee of which belongs to the abutting owners, by a telegraph company, for the erection of its poles, is an additional burden to the easement for a highway, for which the owners of the fee are entitled to compensation: *Eels* v. *Am. Telephone & Telegraph Co.*, 38 N. E. Rep. 202; affirming *Eels* v. *Am. Tel. & Tel. Co.*, 65 Hun. 516; S. C., 20 N. Y. Suppl. 600. To the same effect are *Blashfield* v. *Empire State Telephone & Telegraph Co.*, 18 N. Y. Suppl. 250; S. C., 24 N. Y. Suppl. 1006; 71 Hun. 532; *Chesapeake & Potomac Telephone Co.* v. *Mackenzie*, 74 Ind. 36. Other courts, however, have held a contrary doctrine: *Pierce* v. *Drew*, 136 Mass. 79; *Julia Building Assn.* v. *Bell Tel. Co.*,

88 Mo. 258. The most recent case to this effect is *Brown* v. *Eaton*, (Mich.), 59 N. W. Rep. 145, in which the court declared that it was difficult to see any distinction between the use of a highway for electric railway poles and for poles erected for the use of a telegraph or telephone company; in wilful ignorance of the manifest distinction that the former is a use for travel, the latter not. Such arguments are their own best refutation.

Evidence, Privileged Communications

The District Court for the Northern District of California, after reviewing the authorities, has wisely concluded, in *In re Storror*, 63 Fed. Rep. 564, that telegraph messages, in the hands of a telegraph company, are not privileged communications, so far as the company is concerned, and their production will be compelled by *subpoena duces tecum*, in aid of an investigation by a grand jury of supposed criminal acts of the senders and receivers of messages, with which the company and its officers are not in any way concerned.

False Pretences

According to the Court of Appeals of Kentucky, a person, who by his "conduct" falsely represents himself as the agent of a railroad company, and procures money from another on the strength of employment which he promises him, obtains the money by a "false pretence, statement or token," under Gen. Stat. Ky., c. 29, art. 13, § 2: *Comm.* v. *Murphy*, 27 S. W. Rep. 859.

Forgery

The Supreme Court of Louisiana has lately given one of those decisions, based on the technical rules of the old common law, that are apt to afford more comfort than discouragement to the criminal classes, by holding, in *State* v. *Taylor*, 16 So. Rep. 190, that where the defendant has signed the name of a number of drawers to a note, and signs an addendum to the note, stating that he is their authorized agent, he cannot be convicted of forgery, as an apparent agent cannot be convicted of that crime, though he has no authority in fact; and the falsehood lies not so much in the forgery of the instrument, as in the false assumption of

authority as agent. But the expression of the court that the defendant was not guilty of making the instrument, and therefore not within the definition of a forger, leads one to suspect that they confounded the meaning of the word "making," as used in the definition of forgery, with its much narrower meaning as applied to a promissory note. At any rate, the doctrine needs a legislative reproof.

Fraudulent Conveyances

The Supreme Court of Iowa, in *Ware* v. *Purdy*, 60 N. W. Rep. 526, holds that a voluntary conveyance to the wife and children of the grantor is not fraudulent as against existing creditors, though not recorded, when the grantor is solvent at the time, and the deed is made by him in view of possible injury to his business of liquor selling from prohibitory legislation then pending, provided that enough property is retained by him to pay existing debts. *Quære*, as to the effect of such a conveyance as against subsequent creditors. The Supreme Court of Indiana maintains the same general doctrine, in *Emerson* v. *Opp*, 38 N. E. Rep. 330. The latter court, however, also holds, that the mere joinder by the wife, for the purpose of conveying her inchoate interest, in a conveyance, fraudulent as against creditors, of real property of the husband, through a trustee, to himself and his wife, to hold by entireties, does not form such a consideration as will support the conveyance; and the wife who so joins is affected by the fraud of the husband, whether she had knowledge of it or not: *Phillips* v. *Kennedy*, 38 N. E. Rep. 410.

Goodwill

The Court of Appeals of Kentucky has lately ruled, in *J. G. Mattingly Co.* v. *Mattingly*, 27 S.W. Rep. 985, that when one purchases the goodwill and firm name of a business, he is entitled to receive letters and telegrams addressed to that firm name, and to the advantage resulting from business transactions proposed in them by the customers of the old firm.

The Common Pleas of New York City and County, in

Banzer v. *Banzer*, 30 N. Y. Suppl. 803, has held, that an estate by entireties can only be created by a conveyance to husband and wife, and that, therefore, a conveyance to the wife by the husband's co-tenant will not create such an estate.

Husband and Wife, Entireties

In the opinion of the Court of Appeals of Kentucky, since the passage of the married women's acts, enabling a married woman to contract with third persons as if she were sole, a wife may form a partnership with her husband, so as to bind her property for the payment of partnership debts to strangers: *Louisville & N. R. Co.* v. *Alexander*, 27 S. W. Rep. 981.

Partnership

There is a very decided conflict of opinion on this latter subject; but the mass of authority, if not the weight, seems to be against the view of the Kentucky court. That view has been accepted in Michigan, *Vail* v. *Winterstein*, 94 Mich. 230; S. C., 53 N. W. Rep. 932, and in Vermont, *Lane* v. *Bishop*, 65 Vt. 575; S. C., 27 Atl. Rep. 499, but rejected in Arkansas, *Gilkerson-Sloss Co.* v. *Salinger*, 19 S. W. Rep. 747; in New York, *Kaufman* v. *Schoeffel*, 37 Hun, 140; *Lowenstein* v. *Salinger*, 17 N. Y. Suppl. 70; in South Carolina, *Weisiger* v. *Wood*, 36 S. Car. 424; S. C., 15 S. E. Rep. 597, and in Washington, *Board of Trade of Seattle* v. *Hayden*, 30 Pac. Rep. 87. In one recent case, in South Carolina, *Vannerson* v. *Cheatham*, 19 S. E. Rep. 614, the court claimed that entering into a contract of partnership would be a contravention of the statutory prohibition against becoming liable to answer for the liability of another; but this is absurd, as the liability of a firm is that of each of the members individually, not that of each for the others. There seems to be no good reason why a wife should not become partner in a firm, either with her husband, or with any one else. At any rate, no valid objections have as yet been urged against it.

The right to take and use the ice on streams and ponds seems to be a matter that is never settled. It is a most curious phenomenon, that one of the earliest decisions on the subject, one that has been

Ice

deservedly hooted at, *Mill River Mfg. Co.* v. *Smith*, 34 Conn. 462, should have received two adherents within the last year, and one of them, apparently, entirely independent in its origin. In *Eidemiller Ice Co.* v. *Guthrie*, 60 N. W. Rep. 717, the Supreme Court of Nebraska ruled, (1) That the owner of a mill, who has the right to maintain a pond, or flow back the water of a stream on the land of another, and to use such water to operate his mill, possesses, as to the water, the dominant right, and while not the actual owner of the ice which forms on the pond, is entitled to have it remain there during the time, and whenever, its so remaining will be or is useful and necessary to the legitimate exercise of his right to use the water as motive power for the mill, or to successfully operate the mill; but the owner of the land, if upon a navigable stream, may make any use he desires of the ice which forms over and above so much of the bed of the stream to which his ownership extends, as does not interfere with or injure the rights of the mill owner; (2) That if the owner of the mill and dam subservient thereto wantonly and unnecessarily draws water from, or lowers the water in the pond, and by so doing injures or destroys the ice privileges of the owner of the land bordering on the pond, he thereby renders himself liable in damages to the riparian owner; but the damage is not irreparable, and an injunction will not lie to restrain him from so drawing off the water. The Supreme Court of Connecticut, following its former decision, held some time ago, in *Howe* v. *Andrews*, 62 Conn. 398; S. C., 26 Atl. Rep. 394, with which the first part of the decision above is in harmony, that the riparian owner can not cut the ice on a mill pond, when its removal will cause an injury to the right of the mill owner. No better comment can be made on this doctrine than the language of the court in *Brookville & Metamora Hydraulic Co.* v. *Butler*, 91 Ind. 134; S. C., 46 Am. Rep. 581, and *Cummings* v. *Barrett*, 10 Cush., (Mass.), 186. There is an annotation on the general subject of property in ice, in 32 AM. L. REG. 166.

In the opinion of the Supreme Court of North Carolina,

a license tax imposed on "every itinerant who puts up lightning rods," imposes no burden on interstate commerce, as the sale and delivery of the articles are separable from the erection of the same; and the original packages must of necessity be broken before the articles are put up: *State* v. *Gorham*, 20 S. E. Rep. 179.

Interstate Commerce, License

The Supreme Court of Appeals of Virginia, also, maintains that a statute, which allows the receiver of a telegram to recover a penalty from the telegraph company for failure to deliver the telegram as soon as practicable, is not in conflict with the interstate commerce clause of the constitution: *Western Union Tel. Co.* v. *Bright*, 20 S. E. Rep. 146. The telegram in this case was a domestic one, and therefore within the rule laid down last year by the Supreme Court of the United States, in *Postal Telegraph Co.* v. *Charleston*, 153 U. S. 692; S. C., 14 Sup. Ct. Rep. 1094, which held that a license tax imposed on such telegrams was valid. But the Virginia Court went a step further, and, though *obiter*, reasserted the doctrine already declared by it in *Western Union Tel. Co.* v. *Tyler*, 18 S. E. Rep. 280, that the penalty could be recovered for failure to deliver a telegram from another state, at least in the absence of conflicting legislation by Congress.

Penalty

The Supreme Court of California holds, as no one should have been foolish enough to question, that a judge, who, by marriage, is first cousin, or cousin-german, of a stockholder in a corporation, is not thereby disqualified to hear a case in which the corporation is interested: *Robinson* v. *So. Pac. Ry. Co.*, 30 Pac. Rep. 94. If the contention in the case were sound, it would apply with tenfold force to the case of a judge who is himself a stockholder in a corporation; and yet these sit almost every day, and no one questions their qualification. It may and safely be taken as the general rule, that none but a direct interest in the subject matter is now sufficient to disqualify a judge. See 1 AM. L. REG. AND REV. (N. S.) 817.

Judge, Disqualification

The Supreme Court of South Dakota has recently decided

a very interesting point of law, in *Brettell* v. *Deffebach*, 60 N. W. Rep. 167, in which case it held that though, as a general rule, none but parties to a judgment can have it set aside, a real party in interest, who is the only one prejudiced by a judgment rendered by default in an action to which he was not made a party, has a standing in court that entitles him to move to have that judgment vacated, on the ground that there was no service of summons sufficient to give the court jurisdiction of the persons of the nominal defendants, and that the case was not prosecuted with reasonable diligence.

Judgments

The facts of this case were peculiar. The applicant for relief purchased the real estate affected by the judgment, of the parties defendant, in 1882, and took title in 1887, on a certificate of the clerk of the circuit court that no suits were then pending against them, but this was in fact pending, having been begun in 1880, though no steps had been taken since that time. In 1889, judgment was entered against the vendors by default, which, under the laws of that state, bound the land in the hands of the purchaser.

In *Vallery* v. *State*, 60 N. W. Rep. 347, the Supreme Court of Nebraska has ruled that it is no defence to a criminal prosecution for libel that the writing complained of was a repetition of previous oral publications, and that the defendant was induced to make the written publication by the acts of the person concerning whom the libel was published.

Libel

The Supreme Court of Pennsylvania, in *Patterson* v. *Graham*, 30 Atl. Rep. 247, has announced the very reasonable rule, that when the purchaser of growing trees for the purpose of manufacture enters on the land within a reasonable time, and cuts all the timber apparently worth taking, and thereupon removes his mill, and abandons the premises for eleven years, his right to enter and cut timber is gone.

License

According to the Supreme Court of Iowa, a statement in a

Limitation

letter to the writer's creditor, in regard to a certain note, that "you know that I will pay what I can, and what is right," is not a sufficient admission of liability to remove the bar of the statute of limitations: *Nelson* v. *Hanson*, 60 N. W. Rep. 655.

Lottery

The Circuit Court of Appeals of the Seventh Circuit, in *MacDonald* v. *U. S.*, 63 Fed. Rep. 426, has held, that when the value of bonds in an investment company depends on their numbering, and the numbering is done by the secretary of the company, according to the order in which the applications happen to reach him, the result of the purchase of such bonds is so dependent on chance, as to render their sale a lottery.

Malicious Prosecution

The Supreme Court of Iowa has lately ruled, that when a person institutes a criminal prosecution, with full knowledge of all the material facts, and of their insufficiency to support the charge, the facts that the accused waived a preliminary hearing, that he was indicted, and that the jury disagreed on the trial, are no defence to an action for malicious prosecution, though the person who prosecutes did not appear before the grand jury, nor give false testimony on the trial: *Barber* v. *Scott*, 60 N. W. Rep. 497.

Master and Servant

The Circuit Court of Appeals of the Seventh Circuit has rendered a most interesting and important decision, in *Arthur* v. *Oakes*, 63 Fed. Rep. 310, on appeal from the famous order of Judge Jenkins, in *Farmers' Loan & Trust Co.* v. *N. Pac. Ry. Co*, 60 Fed. Rep. 803, which called down on that unhappy gentleman's head the woes of a CONGRESSIONAL INVESTIGATION. Justice Harlan, in delivering the opinion of the court, reviews the ground very carefully, and concludes that the court below erred in granting the clause of the injunction, restraining the employés of the road from "so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of the said railroad," on the ground that it would be an invasion of one's natural liberty to compel him

to work for, or to remain in the personal service of another. One who is placed under such restraint is in a condition of involuntary servitude. The rule is, without exception, that equity will not compel the actual affirmative performance by an employé of merely personal services, any more than it will compel an employer to retain, in his personal service, any one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employé, engaged to perform personal service, to quit that service, rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting, in the one case, or the discharging, in the other, is in violation of the contract between the parties, the one injured by the breach has his action for damages, and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day, or the affirmative acceptance, of merely personal services. Relief of that character has always been regarded as impracticable. In the case of a railroad, the injury and inconvenience to the public that may result from simultaneous cessation of work by any considerable number of employés should be remedied by legislation.

This, however, studiously ignores the fact that the remedy by action for damages for breach of contract is wholly inadequate, and that the position of the railroad employé is *quasi*-public, and his services not of a "merely personal" nature. A public officer may be compelled to perform the duties of his office by mandamus; and equity can certainly enjoin him from refusing to perform those duties. The failure of the court to pass upon these questions robs the decision of much of its weight.

But even as it stands, it is by no means the victory for labor that it has been boasted to be, and as the worthy gentlemen who composed the Strike Commission, in their fatherly solicitude for the poor workingmen, seem to have understood it to be, judging from the reference to it in their report. Justice Harlan admits that while individual cessation of work cannot be restrained, a combination or conspiracy to procure

an employé or body of employés to quit service in violation of their contract of service, would be unlawful, and in a proper case might be enjoined, if the injury threatened would be irremediable at law; and that, accordingly, the clause of the injunction granted, restraining the employés "from combining and conspiring to quit, with or without notice, the service of said railroad, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad," was good. See 1 AM. L. REG. & REV. (N. S.) 609.

Mechanics' liens are always a fruitful source of litigation; and the reports are usually plentifully seasoned with cases on that subject. The present month is no exception.

Mechanics' Liens

The Supreme Court of Michigan, in *Davis & Rankin Bldg. & Mfg. Co.* v. *Murray*, 60 N. W. Rep. 437, has recently decided, that when a number of subscribers to the stock of a creamery company contract for the erection of a building, but the contract of subscription creates only a several liability, a mechanics' lien cannot be enforced on the joint property for the non-payment of the contract price; and the Supreme Court of Kansas has held, that a lien for materials furnished for the erection of improvements on land in one state, may be maintained when the contract for the materials was entered into in another: *United States Inv. Co.* v. *Phelps & Bigelow Windmill Co.*, 37 Pac. Rep. 982.

According to the Supreme Court of South Dakota, in the absence of an express agreement, or anything indicating an intention to the contrary, a mechanic or materialman does not waive his right to file and enforce a lien, by merely accepting, for the amount of his claim, the promissory note of the owner, at his instance and request, and for the sole purpose of suspending his right to foreclose such lien for sixty days, at which time the note, according to its terms, matures: *Hill* v. *Alliance Bridge Co.*, 60 N. W. Rep. 752.

Waiver

This is in accord with the general rule on the subject, that the mere taking of collateral security will not amount to

a waiver of the right to a lien, unless there is an express understanding to that effect, or it can be implied from the acts of the parties: *Hoagland* v. *Lusk*, (Neb.), 50 N. W. Rep. 162. Payment is, of course, a bar to a lien, and the acceptance of a note as payment, whether it be that of the owner or of a third person, will be a waiver of the right to file a lien: *Smith* v. *Parsons*, 37 Neb. 677; S. C., 56 N. W. Rep. 326. So, too, the fact that the creditor discounted the note affords a strong presumption that he accepted it as payment of the debt, and will amount to a waiver, where it is not in his possession or control at the time of suing out the lien: *McDuffee* v. *Rea*, 13 Pa. C. C. R. 261. But the lien is not waived, if the circumstances attendant upon the taking of the note are not inconsistent with its retention: *Kilpatrick* v. *Kansas City & B. R. R.*, (Neb.), 57 N. W. Rep. 644; *Jones* v. *Moores*, 67 Hun. 109; S. C., 22 N. Y. Suppl. 53; and the fact that, after the note was negotiated, the creditor redeemed it, and surrendered it, will show an intention to preserve the right to the lien: *Davis* v. *Parsons*, 157 Mass. 584; S. C., 32 N. E. Rep. 1117. The taking of a note as collateral security merely suspends the enforcement of the lien until the note is payable: *Keogh Mfg. Co.* v. *Eisenberg*, 27 N. Y. Suppl. 356. But it has been held in Canada, that when the lien is thus suspended during the currency of a note, it is absolutely gone: *Edmonds* v. *Tiernan*, 21 Can. S. C. R. 406.

Mortgage

The Irish Chancery Division, in *Biddulph's Estate*, [1894] 1 I. R. 488, has recently decided, that an agreement by B. with A., as follows: "In consideration of the advances this day made by you, I hereby agree that in case I fail to pay you any promissory note or bill of exchange of mine when due, I shall, upon demand, execute to you a mortgage on all my houses and lands, to secure to you the payment of all sums of money advanced, or to be advanced, by you to me, on my promissory notes, or bills of exchange, with interest, till paid, at such rate as may, in each case, be provided by such promissory notes or bills of exchange," creates, without any demand, a valid equitable mortgage on

lands, the property of B. at the time of the agreement, for the amount of notes or bills unpaid at maturity; the words, "on demand," having reference to the execution of a legal mortgage.

Municipal Corporations, Ordinances

The Supreme Court of Louisiana has again asserted the rule, that the power vested in a municipal corporation by the legislature, to make by-laws for its own government and the regulation of its police, includes the power to punish violations of its ordinances, though the offence, (*e. g.*, carrying concealed deadly weapons,) is also denounced by state law: *Board of Police of Opelousas* v. *Giron*, 16 So. Rep. 190. See 1 AM. L. REG. & REV. (N. S.) 669.

Ordinances, Judicial Notice

The Supreme Court of Nebraska, in *Foley* v. *State*, 60 N. W. Rep. 574, while acknowledging the general rule to be, that the courts will not take judicial notice of municipal ordinances unless required so to do by special charter or general law, very wisely rejected the weight of authority, and held that an exception to that rule should be recognized, in favor of courts of municipal corporations, which will take notice of ordinances of their own municipalities, since they stand in the same relation to those ordinances as courts of general jurisdiction to the general laws of the state; and that, therefore, such ordinances need not be set out in an information preferred in a municipal court.

This, however, must be understood to apply only to purely municipal courts of limited jurisdiction, and not to courts of general jurisdiction, which may happen to be located within the bounds of the municipality.

Negligence, Act of God

According to a recent decision of the Supreme Court of Wisconsin, when a telephone company negligently leaves a wire connecting plaintiff's building with another, and a pole on the latter is struck by lightning, which is conducted along the wire to plaintiff's building, and sets it on fire, so that it is burned, the company cannot claim that the lightning was the act of God, as by its negligent act

it so arranged that the stroke could destroy plaintiff's building: *Jackson* v. *Wis. Tel. Co.*, 60 N. W. Rep. 430.

Among the many subdivisions of the general subject of negligence, that of imputed negligence is fast becoming one of the most prominent. Several decisions on this point have been published during the past month. The Supreme Court of Indiana has decided, that the negligence of a husband, driving his wife over a railroad crossing, where she is injured, cannot be imputed to her, so as to bar her recovery: *Lake Shore & M. S. Ry. Co.* v. *McIntosh*, 38 N. E. Rep. 476. To the same effect are *Louisville, New Alb. & Chic. Ry. Co.* v. *Creek*, 130 Ind. 139; S. C., 29 N. E. Rep. 481; *Chic., St. L. & Pitts. Ry. Co.* v. *Spilker*, 134 Ind. 380; S. C., 33 N. E. Rep. 280, rehearing denied, 34 N. E. Rep. 218. But the negligence of the husband has been imputed to the wife, who remained seated in the carriage at a railroad station, while he held the horse, "because she was in his care:" *Toledo, St. L. & Kansas City Ry. Co.* v. *Crittenden*, 42 Ill. App. 469. As if the understanding between the parties could relieve the railroad company from liability for its own negligence!

Imputed Negligence, Husband and Wife

The Court of Civil Appeals of Texas has recently passed upon two cases on the question of the imputation of the negligence of a parent to a child, and in both cases held the negative. In *Houston City Ry. Co.* v. *Richart*, 27 S. W. Rep. 918, it ruled, that when a father and minor son, both members of the city fire department, are both injured by the overturning of a hose cart, driven by the father, caused by the defective construction of a street railway track at a street crossing, the negligence of the father, if any, cannot be imputed to the son; and in *Allen* v. *Tex. & Pac. Ry. Co.*, 27 S. W. Rep. 943, that in an action by a child, through its father as next friend, against a railroad company, for personal injury, the negligence of the father, in whose care the child was travelling, cannot be imputed to the latter. These are the more remarkable, as the same court, in *Johnson* v. *Gulf, C. & S. F. Ry. Co.*, 21 S. W. Rep. 274, held that the negligence of the father was to be imputed to a blind son, of age of dis-

Parent and Child

cretion, who was unable to take care of himself, and, of his own volition, entrusted his safety to his father. Similarly, the negligence of the mother is not to be imputed to a child: *Tex. & Pac. Ry. Co.* v. *Fletcher*, (Tex.), 26 S. W. Rep. 446. See *Murphysboro* v. *Woolsey*, 47 Ill. App. 447; *St. L., I. M. & S. Ry. Co.* v. *Rexroad*, (Ark.), 26 S. W. Rep. 1037.

The negligence of the driver of a vehicle, with whom the person injured is riding at his invitation, and over whom he has no control, is not to be imputed to the latter: *Al. & V. Ry. Co.* v. *Davis*, 69 Miss. 444; S. C., 13 So. Rep. 693; *B. & O. R. R.* v. *State*, (Md.), 29 Atl. Rep. 518; *contra*, *Whittaker* v. *City of Helena*, (Mont.), 35 Pac. Rep. 904. The negligence of the driver of a street car is not to be imputed to a passenger: *Little Rock & M. R. Co.* v. *Harrell*, 58 Ark. 454; S. C., 25 S. W. Rep. 117. And the negligence of a wife, which caused her injury, is not imputed to the husband, so as to bar his recovery for those causes of injury peculiar to himself, such as the loss of her society and aid in household affairs, and medical expenses: *Honey* v. *C., B. & Q. Ry. Co.*, 59 Fed. Rep. 423. But the negligence of a nurse, in charge of a child, will be imputed to its parents, so as to bar a recovery by them for its death: *Schlenks* v. *Central Pass. Ry. Co.*, (Ky.), 23 S. W. Rep. 589. And the negligence of a gripman, under the control of the conductor of a car, will be imputed to the latter, so as to bar his recovery from a third person, whose acts contributed to the injury: *Minster* v. *Citizens' Ry. Co.*, 53 Mo. App. 276.

There is a full annotation on this subject in 32 AM. L. REG. 763.

Negotiable Instrument

In the opinion of the Court of Appeals of New York, when an instrument is in all other respects a negotiable promissory note of a corporation, the fact that a seal is affixed thereto, purporting to be the seal of the corporation, but unaccompanied by any recital or act showing that the officers of the corporation intended, or, in fact, did affix it, does not destroy its negotiability: *Weeks* v. *Esler*, 38 N. E. Rep. 377.

The Chancery Division, in *Lambton* v. *Mellish*, [1894] 3 Ch. 163, has lately applied the principle that the acts of two or more persons may, taken together, constitute such a nuisance that the court will restrain all from doing the acts constituting the nuisance, although the annoyance occasioned by the act of any one of them, if taken alone, would not be a nuisance, to the case of two proprietors of merry-go-rounds, who used organs as an accompaniment to their amusement; and enjoined them both.

Nuisance

The Supreme Court of Iowa has reasserted the somewhat harsh doctrine, that a parent is liable for necessaries furnished to a minor son, while living away from home with her consent, though the son was able to work, and controlled his own earnings: *Cooper* v. *MacNamara*, 60 N. W. Rep. 522.

Parent and Child, Necessaries

The same court has also held, that it is within the scope of the partnership business to borrow money to pay the firm debts: *Buettner* v. *Steinbrecher*, 60 N. W. Rep. 177; and that one who loans money to a member of a mercantile firm, and receives from him a note, executed in the name of the firm, has a right to presume that the note was made in the course of the partnership business: *Platt* v *Koehler*, 60 N. W. Rep. 178.

Partnership

The Supreme Court of Nebraska, while admitting that it seems to be the better opinion that the plaintiff, in an action for personal injuries, may be compelled to submit to a personal examination, is of opinion that a judge of the district court has no jurisdiction, at chambers, outside of the county in which the cause is pending, to make an order requiring the plaintiff to submit his body to such an examination by a board of physicians, appointed by the judge for that purpose: *Ellsworth* v. *Fairbury*, 60 N. W. Rep. 336. There is an excellent annotation on the right to enforce personal examination, in 32 AM. L. REG. 550.

Practice, Civil, Personal Examination

The same court holds, that on a trial by the court without a jury, it is not reversible error to deny the party holding the affirmative of the issue the right to open and close the argument, when it is not apparent from the record that he has been prejudiced thereby: *Citizens' State Bank* v. *Baird*, 60 N. W. Rep. 551.

Right to Open and Close

According to the Supreme Court of Florida, an affidavit by the defendant in a criminal case for a continuance on account of the absence of witnesses, should allege that they are absent without the consent of the defendant, either directly or indirectly given: *Bryant* v. *State*, 16 So. Rep. 177.

Practice, Criminal

It has recently been decided by the Supreme Court of Wisconsin, in *State* v. *Evans*, 60 N. W. Rep. 433, that prohibition will not lie to restrain a magistrate from proceeding in a criminal cause, because the warrant was void, since the legal remedy is adequate, nor on the ground that the accused has been once in jeopardy. It is not the province of the writ of prohibition to supply the place of a writ of error.

Prohibition

The Court of Appeals of Kentucky has lately ruled, that when a railroad company allows two passenger cars to remain on a side track, near the depot and along a public street, the doors being open, it is negligence to back other cars against them for the purpose of coupling, without seeking to ascertain whether there are any persons in such cars, though no one had a right to be therein; and if the company neglects its duty in this respect, it will be liable to a boy injured thereby: *Louisville & N. Ry. Co.* v. *Popp*, 27 S. W. Rep. 992. And the Court of Civil Appeals of Texas holds, that a railroad company is liable for injury to mind and body caused by nervous shock and fright, due to the negligent running of cars off a switch into plaintiff's yard, and within a few feet of her house, though the plaintiff was not actually touched: *Yoakum* v. *Kroeger*, 27 S. W. Rep. 953.

Railroads, Negligence

Mental Suffering

The feud between the abstractor of titles and the county officials still continues, and the courts are from time to time obliged to define the limitations of their respective rights *de novo*. In the latest case on this subject, *Burton* v. *Reynolds*, 60 N. W. Rep. 452, the Supreme Court of Michigan decided that no person has a right to keep a clerk continuously in the office of the county clerk, with free access to the files, for the purpose of making abstracts therefrom, except under such reasonable regulations as the county clerk may prescribe, and that the payment of a fee to provide additional office facilities was such a reasonable regulation. The same court recently, in *Day* v. *Button*, 96 Mich. 600; S. C., 56 N. W. Rep. 3, ruled that an abstractor of titles could not use the office of a county officer to the exclusion of others, or annoy him by the presence of a large working force, or by work at unseasonable hours. See *West Jersey Title & Guarantee Co.* v. *Barber*, 49 N. J. Eq. 474, and an annotation on that case, in 31 AM. L. REG. 769.

Records, Inspection

The Supreme Court of Oregon recently held, in *Philomath College* v. *Wyatt*, 37 Pac. Rep. 1022, that the action of the highest ecclesiastical body of a religious sect, in adopting the report of a committee appointed to determine the validity of a constitutional amendment, and to submit it to the vote of its members, the amendment being adopted by the adoption of the report, is legislative, and therefore not binding as an adjudication upon the civil courts; and the Supreme Court of Nebraska has decided, in *Peterson* v. *Samuelson*, 60 N. W. Rep. 347, that when certain members of a church society had withdrawn therefrom and organized another society of the same church, and then returned to the society from which they had withdrawn, there is no presumption that by so withdrawing the seceders forfeited their membership in the church, as parts of which both societies existed, and on reunion the same society existed as had been originally organized.

Religious Societies

According to the Supreme Court of Michigan, an action for

Slander

slander in regard to a business cannot be maintained by the husband of the owner thereof, though, in addition to his salary, he is entitled to a proportion of the profits, when he has no interest in the *corpus* of the business: *Child* v. *Emerson*, 60 N. W. Rep. 292. The Supreme Court of Louisiana is of opinion that an apothecary is not liable in damages to a physician, merely and only because he has on one or two occasions declined to fill his prescriptions, for reasons not at all impugning the physician's capacity; but that he is liable, if, without the slightest cause, he indulges in public expressions tending to create the impression of the physician's incompetency; as, for instance, that his diploma is not worth a straw: *Tarlton* v. *Lagarde*, 16 So. Rep. 180. The same court has also very sensibly held, that when persons mutually engage in bandying opprobrious epithets, an action of slander for words thus uttered is not to be encouraged; and the interchange of such epithets, and mutual vituperation and abuse, will justify a judge in approving a verdict for the defendant, though the slanderous words are proved: *Goldberg* v. *Dobberton*, 16 So. Rep. 192.

Stare Decisis

The Supreme Court of Indiana, in *Stephenson* v. *Boody*, 38 N. E. Rep. 331, has recently decided, that when the Supreme Court overrules its former decisions, construing a statute, and gives it a new construction, contracts affected by that statute, and made while the former construction obtained, will be given the same effect, after the change in construction, as if no such change had been made.

Subrogation

The Supreme Court of Michigan holds, that when the maker of a note executes a chattel mortgage to a trustee to indemnify an indorser against liability thereon, a subsequent mortgagee is not entitled, on tender to the trustee of the amount due on the mortgage, to be subrogated to the rights of the holder of the note, as against the indorser: *Schmittdiel* v. *Moore*, 60 N. W. Rep. 279.

In a recent case in the Appellate Court of Indiana, it was

Sureties, Contribution

ruled, that when a surety pays a judgment obtained against him and two co-sureties, one of whom is insolvent, he may recover in equity from the solvent surety one-half of the amount so paid: *Newton* v. *Pence*, 38 N. E. Rep. 484. The same doctrine prevails in courts of law, wherever the distinctions between actions at law and in equity have been abolished, or equity powers have been conferred on common law courts: *Michael* v. *Allbright*, 126 Ind. 172; S. C., 25 N. E. Rep. 902; *Faurot* v. *Gates*, 86 Wis. 569; S. C., 57 N. W. Rep. 294. But the share of the insolvent surety cannot be recovered from the others, when all the sureties have agreed among themselves to raise a common fund to pay the debt, some contributing more than their adequate share, and others less, but the former agree to release the latter from any further liability: *Cummings* v. *May*, 91 Ala. 233.

Trusts

The Chancery Division has lately held, that when a testator gives all his property to trustees, upon certain trusts, and directs that certain specified sums of money should be invested for the benefit of his four sons on their attaining the age of twenty-one years, such sums to be applied as the trustees in their discretion may think fit; and further directs that the sums specified should be very judiciously invested, as they were intended specially for the advancement in life of the respective recipients; the sons are nevertheless absolutely entitled to the legacies, on attaining the specified age, freed from the exercise of any discretion on the part of the trustees: *In re Johnston*, [1894] 3 Ch. 204.

Vendor and Vendee

The same court, in *Noyes* v. *Paterson*, [1894] 3 Ch. 267, has ruled, that a person who has contracted to purchase land is not entitled to repudiate his contract, merely because one link in the vendor's title consists of a voluntary conveyance to a person under whom the vendor claims by purchase for value.

According to a recent decision of the Supreme Court of

Verdict

Missouri, a verdict cannot be impeached, solely on the affidavit of a juror that the time of imprisonment was fixed by each juror writing on a piece of paper the number of years he was in favor of, and then dividing the sum by 12: *State* v. *Woods*, 27 S. W. Rep. 1114. It is high time that the courts abandoned this useless technicality, and permitted the evidence of such gross violation of duty, from whatever source, to have its proper weight; and not to cling to an absurd presumption in favor of the sanctity of a verdict, that is as unreasonable and as ill-founded as the maxim that "the king can do no wrong."

Waters

The Supreme Court of Iowa has just decided a very interesting and novel case, in which it held that no one of several persons, whose wells tap the same subterranean stream, can make an artificial use of the water therefrom, so as to entirely deprive the others at any time of the ability to make such use of it; that the use of water taken from such a well for city purposes is an artificial use, as is also its use by an individual for a bath-house; and that, therefore, the city cannot deprive the owner of the bath-house of the use of the water, without paying damages therefor: *Willis* v. *City of Perry*, 60 N. W. Rep. 727. It is also actionable to divert water from a stream, either surface or subterranean, by dams, wells or pumps, by which the flow of water is diminished, though such diversion is by the owner of land through which the stream flows or percolates, and on his own premises: *McClellan* v. *Hurdle*, 3 Colo. App. 430. But one is not prevented from lawful digging on his own land, though he thereby drains a spring on the land of another: *Elster* v. *Springfield*, 49 Ohio St. 82. This, however, seems questionable, and is a stretching of the *damnum absque injuria* doctrine to the very last point of tension. The distinction, if there be any, which seems doubtful, lies in the fact that in the actionable cases the act of the owner of the land is intended to interfere with the water, while in the non-actionable cases that interference is only an incidental consequence of an otherwise lawful act.

The Supreme Court of Missouri has recently laid down a very salutary rule, in *State* v. *Gesell*, 27 S. W. Rep. 1101, to the effect that when, after an order excluding all witnesses from the court-room, defendant's witness, a co-defendant to whom a severance has been granted, remains seated by him during the trial, the court is justified in refusing to allow him to be examined, on the ground that the defendant connived at his disobedience.

Witnesses, Separation